

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

KENNETH WHITHAUS

Appellant

v.

THE CURATORS OF THE UNIVERSITY OF MISSOURI

Respondent

DOCKET NUMBER **WD73403**

DATE: August 16, 2011

Appeal From:

Circuit Court of Boone County, MO
The Honorable Kevin Micajah Joseph Crane, Judge

Appellate Judges:

Division Two
Thomas H. Newton, P.J., Cynthia L. Martin, and Gary D. Witt, JJ.

Attorneys:

Paul T. Graham, Jefferson City, MO

Counsel for Appellant

Attorneys:

Kelly S. Mescher, Columbia, MO

Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

KENNETH WHITHAUS, Appellant, v. THE CURATORS
OF THE UNIVERSITY OF MISSOURI, Respondent

WD73403

Boone County

Before Division Two Judges: Newton, P.J., Martin, and Witt, JJ.

In 1999, Mr. Whithaus began receiving benefits through the University's long-term disability plan (the Plan), administered by Assurant Employee Benefits (Assurant). In a letter on November 2, 2009, Assurant informed Mr. Whithaus that his benefits were terminated and that if he wished to request a review of the decision, he should refer to the attached Procedure. The Procedure informed him a review could be requested from the University or from Assurant "within 90 days of receipt of the written notice of denial." On November 23, 2009, Mr. Whithaus sought review. On January 29, 2010, Assurant denied Mr. Whithaus's appeal and informed him that if he wished to request a review, he should appeal to the University and referred him to the same Procedure. On July 7, 2010, Mr. Whithaus's attorney wrote Assurant, requesting review of the benefits determination. The University denied the request for review because it had been more than 90 days since he had received notice of the denial of his benefits in the January 29 letter.

Mr. Whithaus filed suit, seeking, *inter alia*, a judgment restoring his benefits. The University moved to dismiss his petition, contending Mr. Whithaus had failed to exhaust his administrative remedies. After argument, the trial court dismissed Mr. Whithaus's suit for lack of subject matter jurisdiction. Mr. Whithaus appeals.

REVERSED AND REMANDED

Division Two Holds:

The trial court erred in dismissing the petition for lack of subject matter jurisdiction. This was not a question of subject matter jurisdiction because the trial court had authority to hear the case.

The petition does not establish on its face that the claim was barred. A disability plan is a contract governed by the rules of contract construction. We question whether the language in the Plan rises to the level of an agreement between the insured and insurer that an administrative procedure must be exhausted prior to judicial review. Further, the Plan itself does not set forth a second appeal procedure with which a claimant is required to comply. Finally, even assuming *arguendo* that the Procedure could be considered part of the Plan such that it set forth requirements for Mr. Whithaus, he complied with its terms by seeking review within 90 days of the November 2 letter.

Consequently, Mr. Whithaus's claim was not properly dismissed for lack of subject matter jurisdiction, nor was Mr. Whithaus required to seek a second appeal to the University prior to bringing suit.

Opinion by Thomas H. Newton, Presiding Judge

August 16, 2011

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